(2)

No. 91-417

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALVARO QUIROGA,
PETITIONER,

v.

HASBRO, INC. AND PLAYSKOOL BABY, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HASBRO, INC. AND PLAYSKOOL BABY, INC. IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Should this Court disturb the findings entered by the U.S. District Court for the District of New Jersey, concurred in by the U.S. Court of Appeals for the Third Circuit, that: 1) petitioner's complaints of discriminatory treatment neither caused respondent Hasbro, Inc. to deny him stock options, nor caused his employment with respondent Playskool Baby, Inc. to cease; and 2) petitioner's action was groundless, and justified an award of attorneys' fees to respondents?

LIST OF PARTIES

Respondent Hasbro, Inc. ("Hasbro") has no parent companies. Hasbro is engaged in numerous joint ventures as a result of which it has less than 100% ownership of the following entities: Playskool Royal Industries, Inc.; Interactive Video; Nanhai County, Yongnan Toy Manufacturing Co. Ltd.; Buji Soft Toys Company Ltd.; J.W. Spear & Sons PLC; Pierwall, Ltd.; Anibal E. Abrantes, SARL; Funskool (India) Ltd.; and Bangkok Toy Manufacturing Ltd.

Hasbro is the parent company of Respondent Playskool Baby, Inc. ("Playskool"). Playskool is engaged in a joint venture with Hasbro as a result of which it has less than 100% ownership of Playskool Royal Industries, Inc.

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OPINIONS BELOW

In addition to the opinions described in the petition, the United States Court of Appeals for the Third Circuit has issued an opinion on Hasbro's[1] motion for attorneys' fees incurred in

[1] Except as otherwise indicated, reference to "Hasbro" is to both Hasbro and Playskool.

defending the appeal on the merits (Appeal No. 90-5284) to that court. That opinion is reprinted herein as Appendix A.

STATUTORY PROVISIONS INVOLVED

In addition to those set forth in the petition, the following statutory provision is pertinent:

> In any action or proceeding under this title, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §2000e-5(k).

STATEMENT OF CASE

A. *Introduction*

In his statement of the case, and elsewhere in his petition, petitioner Alvaro Quiroga ("Quiroga") makes several material omissions and misstatements regarding the proceedings below. In accordance with Rule 15.1 of this Court's rules, Quiroga's misstatements are identified in the Statement of Case and Argument sections.

B. *Factual Background*

Quiroga is a native of Cuba and emigrated to the United States in 1962. (Appendix to Petition ("App.") 49a) From 1983 through 1988, he was Vice President of Operations for a Playskool manufacturing plant in New Jersey. (*Id.* at 4a-5a,

49a-50a) Quiroga was a valued part of Hasbro's management team. (*Id.* at 4a-5a, 50a-52a, 55a, 59a)

In 1987, Quiroga became dissatisfied with a number of management actions, including, in early 1988, the failure to award him stock options. (*Id.* at 5a, 52a) Hasbro did not award Quiroga stock options because of his failure to follow the Company's manufacturing plan in 1987. (*Id.*) After Quiroga complained, Hasbro reconsidered, and decided to grant him options, subject to approval by the Board of Directors. (*Id.* at 5a, 52a-53a) Hasbro made this decision in order to get a reorganization of Playskool's management (of which Quiroga was a key part) off to a good start. (*See id.* at 52a-53a) The trial court did not find, nor was there any evidence in the record to support the conclusion, that Hasbro decided to award Quiroga options because he threatened to consult an attorney. (*Cf.* Petition, p. 7)

After learning that he was to receive options, Quiroga, for whatever reason[2], consulted Attorney Stephen Mills. On or about April 5, 1988, Attorney Mills sent an unsolicited letter to Playskool. (*Id.* at 5a, 53a) The letter listed various grievances, mentioned "in passing" that Quiroga was of Hispanic origin,[3] claimed that Quiroga had been constructively discharged, and suggested a meeting to discuss "an outplacement arrangement" for him. (*Id.* at 5a-6a, 39a-42a, 53a-54a)

Hasbro's management interpreted the letter as an announcement of Quiroga's intention to leave the Company. (*Id.*

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[2] In his petition, Quiroga asserts (p. 29) that he sought an attorney to obtain an explanation of the actions bothering him. Yet there is no evidence in the record that Attorney Mills ever asked Hasbro for any explanations. (*See* App. 39a-46a)

[3] This was the first time that Quiroga complained of being discriminated against on account of his national origin. Contrary to the petition's assertions (pp. 5-6, 17, 28, 31), there is nothing in the record which shows that the District Court clearly erred in finding that Quiroga did not complain of national origin discrimination prior to seeing Mills. (*See* App. 11a-12a, 60a)

For further discussion of this issue, *see infra* at 13.

at 6a, 54a) Quiroga finds this interpretation incredible (*see* Petition, pp. 22-24), however, as the District Court specifically found, the letter evidenced a lack of respect for Company management, and spoke of an outplacement arrangement. This could only be interpreted as departure from the Company. (*See* App. 55a)

Despite the April 5 letter, Hasbro did not seek to replace Quiroga. Rather, the Company investigated Quiroga's claims, tried to talk to him, and finally met with Quiroga and Mills on April 19. (*Id.* at 6a, 8a, 55a) At this meeting, both Attorney Mills and his client made plain what had been stated in the letter — that Quiroga would not continue with the Company.[4] Attorney Mills said the "trust bridge" between Quiroga and Playskool had been broken, and that Quiroga could probably not continue in Playskool's employ. (*Id.* at 6a, 8a, 55a-56a) Mills made a seven point "offer" involving payments to Quiroga of nearly $450,000. All the components of the "offer" were premised on Quiroga leaving the Company. (*See id.* at 6a, 56a) Contrary to what the petition implies (*see* p. 23), there is no evidence that either Quiroga or Attorney Mills stated at the April 19 meeting that Quiroga would remain in his job if he was not paid money for his claims.

Following the April 19 meeting, Hasbro concluded that it was in the Company's best interest to respect Quiroga's intention to leave. Hasbro concluded that one holding a position as important as Quiroga's should be willing to remain with the Company on a long-term basis. (*See* App. 9a, 57a, 60a)

Likewise, Hasbro removed Quiroga's name from the list of those to be awarded stock options at the next Board of Directors meeting. (*See id.* at 7a, 56a-57a) Stock options were reserved for outstanding employees with a long-term future at the Company. In light of Quiroga's stated intentions, it was no longer appropriate to award him options. (*See id.*)

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[4] Quiroga's petition is silent on this aspect of the meeting. (*See* Petition, pp. 8, 22-23)

On May 2, 1988, Hasbro's General Counsel wrote Attorney Mills, stating that the Company would be responding to his (Mills') offer to conclude Quiroga's services on May 9, 1988. (*See id.* at 57a) In his response, Mills made no effort to "correct" the reference to an offer to conclude services. (*See id.* at 43a-44a)

On May 9, 1988, Hasbro officials met with Quiroga and told him that they were respecting his wishes to resign, and that he was to leave the Company, effective immediately. (*See id.* at 57a-58a)

C. *Procedural Background*

On March 22, 1989 Quiroga filed suit in the U.S. District Court in Newark. His complaint alleged national origin discrimination, age discrimination and unlawful retaliation in violation of federal and state anti-discrimination law. He also alleged common law claims for breach of contract and intentional infliction of emotional distress. Summary judgment was granted on all these claims, save those for unlawful retaliation. (*See id.* at 2a, 48a-49a)

After a two-day bench trial, the District Court rendered its findings of fact and conclusions of law, and entered judgment for Hasbro. In its opinion, the District Court indicated that but for Quiroga's precarious financial situation, it would be appropriate to award Hasbro the attorneys' fees incurred in defending his baseless action. (*Id.* at 61a) In light of information indicating that Quiroga could in fact pay a fee award, Hasbro filed a motion for attorneys' fees. After discovery into Quiroga's financial circumstances, the District Court assessed $10,000 of Hasbro's attorneys' fees against Quiroga. (*See id.* at 9a-10a)

On February 13, 1991, the U.S. Court of Appeals for the Third Circuit affirmed the District Court on both the merits and award of attorneys' fees, and remanded for consideration of whether attorneys' fees should be assessed in whole or in

part against Attorney Mills. (*See id.* at 19a-36a) In response to Quiroga's petition for rehearing and suggestion of rehearing *in banc*, the original panel vacated its decision (*id.* at 37a-38a), and issued another opinion on June 11, 1991. The opinion on the merits (Appeal No. 90-5284) was identical to that in the earlier opinion. The opinion on the attorneys' fee issue (Appeal No. 90-5748) differed slightly from its earlier counterpart, but the outcome remained the same: affirmance and remand for possible reallocation of fees. (*See id.* at 1a-18a) Quiroga's subsequent petition for rehearing and suggestion of rehearing *in banc* was denied. (*See* Appendix B to this brief) On remand, the District Court has postponed any action, pending disposition of Quiroga's petition to this Court.

After prevailing in the Third Circuit, Hasbro filed a motion under Fed.R.App.P. 38 for the attorneys' fees incurred in defending the appeal. On September 6, 1991 the court allowed the motion as to the appeal on the merits, but not as to the appeal on the attorneys' fee issue. The court assessed the fee award personally against Attorney Mills. (*See* Appendix A to this brief)

REASONS FOR DENYING THE PETITION

A. Introduction — Quiroga's Petition Simply Rehashes Assignments of Error Appropriately Made to an Appellate Court.

This Court has frequently stated that certiorari should not issue to consider a petition which primarily presents questions of fact. *See NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *U.S.* v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1923). Certiorari should not be used to address questions

which are only of importance to the litigants. *Rudolph* v. *U.S.*, 370 U.S. 269 (1968); *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. at 502. When a decision rests on findings concurred in by two lower courts, this Court has been particularly reluctant to disturb those findings. *See NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. at 178.

Quiroga's petition defies all these principles. Notwithstanding a single reference to this Court's power of supervision under Rule 10.1(a) (*see* Petition, p. 30), the petition entreats this Court only to review and reverse questions of fact — whether Quiroga's complaints of discrimination caused his alleged termination of employment, and his loss of stock options. These questions are of importance to the litigants, but rest on unique facts which are unimportant to the public. Moreover, the findings on causation have been concurred in by both the District Court and Appeals Court, and thus are entitled to exceptional deference.

It is with great reluctance, then, that Hasbro responds to the many assignments of error set forth in the petition. Among other things, Quiroga characterizes the Third Circuit's opinion as "deceitful" (*see* Petition, p. 23), claims that the Third Circuit did not carefully review the record (*see id.* at 31, 42), and criticizes that court for not summarily reversing the District Court (*see id.* at 16), when he himself did not seek such relief. Notwithstanding these and other arguments, there is no basis for disturbing the findings of the District Court, concurred in by the Third Circuit.

B. A Writ Should Not Issue to Review Whether Quiroga's "Protected Conduct" Caused Him to Lose His Job and Stock Options.

1. *Quiroga has not Shown that the Third Circuit Committed Clear Error in Upholding the District Court's Findings on Causation.*

The short answer to Quiroga's assignments of error is that the District Court did not clearly err in finding no causal link between his protected activity and the loss of his job and stock options. Hasbro's witnesses testified that the April 5 letter of Quiroga's counsel, coupled with the statements made at the April 19 meeting, demonstrated that Quiroga had no intention of remaining with Playskool. Because Hasbro wanted someone in the important position of plant manager who was willing to remain on a long-term basis, it chose to accept what it characterized as his resignation. Likewise, Hasbro decided not to grant Quiroga stock options because they are awarded to employees who, unlike Quiroga, wanted to remain with the Company. (*See* App. 7a-9a, 59a-61a)

Quiroga appears to make two principal claims of error. He first asserts (Petition, p. 16) that the District Court clearly erred with respect to causation by initially ruling in his favor on Hasbro's motion for summary judgment, but later ruling against him when all the evidence had been heard. Quiroga is confused. On the motion for summary judgment, the District Court, of course, viewed all the evidence in the light most favorable to Quiroga. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). At trial, Quiroga's claims were judged by a more rigorous standard. Absent the lenient view available in the summary judgment setting, Quiroga's claims failed, and nothing about this common circumstance merits review by this Court.

Second, Quiroga finds it inconceivable (Petition, p. 22) that his attorney's April 5 letter and the meeting of April 19 could

be interpreted as contemplating departure. He offers nothing to support this conclusion, however. By contrast, the District Court explained that "[t]he letter evidenced a total lack of respect and confidence on [Quiroga's] part in his employer without which one cannot be an effective part of a management team. It also spoke of [Quiroga's] wish to enter into an outplacement arrangement. That can only be interpreted as contemplating departure from the company." (App. 55a) In addition, the letter charged that Quiroga had "been the subject of a constructive discharge" (*id.* at 42a) — i.e., his working conditions were so intolerable that no reasonable person could be expected to endure them. *See Spangle* v. *Valley Forge Sewer Authority*, 839 F.2d 171, 173 (3rd Cir. 1988).

With regard to the April 19 meeting, Quiroga ignores (*cf.* Petition, p. 22) certain salient facts. At the meeting, Attorney Mills asserted that Hasbro had breached its "trust bridge" with Quiroga, and that Quiroga probably could not continue on. (App. 6a, 55a) Moreover, all components of the "settlement proposal" depended on Quiroga leaving the Company. (*See id.* at 6a, 56a) Neither Mills nor Quiroga made any proposal under which Quiroga would have remained with Playskool. Indeed, the reference to "constructive discharge" in the April 5 letter left little doubt about the course of action Quiroga would have taken had he not received a sum of money to his liking — resign, and claim intolerable working conditions premised on unlawful discrimination.[5]

As he did below, Quiroga makes numerous claims of error by the District Court. For one, he claims that the court refused to treat his complaints of discrimination as protected conduct under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII"). (*See* Petition, pp. 20-21) In fact, the District Court explicitly found that Quiroga engaged in

[5] Under these circumstances, the fact that Mills and Quiroga spoke about resignation as part of a settlement proposal (*cf.* Petition, p. 23) did not make it unreasonable for Hasbro to conclude that Quiroga would leave the Company absent a "settlement."

protected conduct under Title VII. (*See* App. 59a) What the District Court could not accept was that Hasbro had to employ a vice president who no longer wanted to stay with the Company. Regardless of whether the letter and the meeting "were absolutely protected," as Quiroga claims, without supporting authority (*see* Petition, p. 20), there is no basis for disturbing the District Court's findings on causation.

Quiroga also attacks the District Court for its discussion of the "responsible courses of action" open to him. (*See* App. 60a) The District Court found that Quiroga, after voicing his complaints prior to visiting Mills, should have either accepted his employer's position, or resigned. (*See id.*) This analysis was premised on the conclusion that the discrimination claims raised in the April 5 letter were nothing more than "an attorney construct." (*Ibid.*) Under these circumstances, the District Court properly found that Quiroga acted irresponsibly in complaining of discrimination. *See Monteiro* v. *Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980). *See also Novotny* v. *Great American Federal Savings & Loan Association*, 539 F.Supp. 437, 451 (W.D.Pa. 1982).

On top of attacking its findings, Quiroga even attacks the District Court (*see* Petition, pp. 10, 20) for statements made during closing arguments, in which the court characterized his attorney's April 5 letter as crazy, and his "settlement proposals" as extortion. In so doing, Quiroga ignores the fact that he and his attorney presented two choices to Hasbro in April 1988: either meet his demands for almost $450,000, or else he would resign, claim constructive discharge, and sue. This is a fair definition of extortion. (*See Webster's Third New International Dictionary of the English Language* (1961), defining "extort" as "obtain[ing] from an unwilling or reluctant person by . . . intimidation . . ."). As for the reference to the letter as "crazy," the results of the letter, when weighed against the benefits achieved for Quiroga by it, show the soundness of the District Court's judgment.

In sum, Quiroga's petition simply asks this Court to review the record and make factual determinations contrary to those made by two lower courts. He has not shown why the Court's reluctance to intervene in disputes of this kind should be overcome. The petition for a writ of certiorari should thus be denied.

2. *The Questions Presented Are Either Insignificant or Not Properly before this Court.*

The questions which Quiroga proposes to put before this Court on the retaliation issue are either insignificant or irrelevant. The first question essentially asks if Title VII protects against retaliation; this hardly merits examination by this Court. The second and third questions[6] present issues which are not raised by the Third Circuit's opinion. Neither the Third Circuit nor the District Court doubted that Quiroga engaged in protected activity. What they addressed was whether the protected conduct was causally linked to the alleged termination and denial of stock options (*see* App. 7a-9a, 58a-61a) — purely factual issues which are only of interest to the parties. As for the merits of Quiroga's underlying claims of discrimination, this again is not an issue raised by the opinions below. As stated, those opinions addressed the causal link between Quiroga's protected conduct and the alleged adverse employment actions.

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[6] Those question are:

> Does Title VII's protection against retaliation also extend to the right of an employee to retain counsel and engage in settlement negotiations with an employer to resolve Title VII claims?
>
> Must plaintiff also establish that his perceived Title VII claims are meritorious in order to prove a cause of action for retaliatory termination under Title VII?

C. The Third Circuit Did Not Err in Upholding the District Court's Award of Attorneys' Fees, Entered on the Ground that Quiroga's Suit was Without Foundation.

Quiroga's argument regarding the award of attorneys' fees appears to be in two parts. His first claim is embodied in his first question presented on the issue,[7] namely, that he should have prevailed on the merits of his retaliation claim, thus making an award of attorneys' fees inappropriate. Hasbro disagrees with Quiroga's view of the record, and the propriety of this Court reviewing such a question, for the reasons discussed above.

Quiroga's central argument appears to run as follows: he complained about discrimination prior to his attorney's April 5 letter, and his testimony on this score was not challenged. Thus, a court cannot conclude that his Title VII claims are meritless. This argument contains both legal and factual flaws.

First, Quiroga misapprehends the grounds upon which attorneys' fees were awarded. The District Court awarded fees under §706(k) of Title VII, 42 U.S.C. §2000e-5(k). As the Third Circuit recognized (*see* App. 11a), attorneys' fees are awarded to a prevailing defendant under this statute if the action is meritless, frivolous, unreasonable or without foundation, regardless of whether it was brought in bad faith. *See generally Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). Thus, even if Quiroga complained in good faith about discrimination on the basis of national origin and/or age prior to the April 5 letter, this does not establish that the claims of discrimination asserted in the complaint passed the *Christiansburg* standard.[8]

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[7] The first question reads, "When the entire trial record discloses that respondents violated Title VII by retaliating against petitioner, did the District Court and Court of Appeals err in imposing sanctions against plaintiff and/or his attorney."

[8] Quiroga's misunderstanding is reflected in his second question presented

The petition implies (*see, e.g.*, p. 31) that Quiroga's claims of discriminatory treatment went unrebutted at trial, and thus had to be accepted by the District Court. This is preposterous. The District Court granted summary judgment on many of Quiroga's underlying claims of discrimination, none of which Quiroga appealed, save the stock options issue, which went to trial. These claims (alleged limitation of responsibilities, inadequate pay increase, inadequate bonus, alleged failure to promote) were not at issue at trial, and were only admitted for purposes of background on the retaliation issue. The retaliation claims, which were at issue, were addressed by Hasbro's witnesses. Quiroga is the one who never rebutted their testimony.

The premise of Quiroga's argument — that he complained of national origin discrimination prior to the April 5 letter — is also spurious. Quiroga has neither cited nor appended to his petition any materials which would indicate that the District Court clearly erred in finding that the complaint of *national origin* discrimination was voiced or considered by Quiroga prior to seeking counsel. (*See* App. 11a-13a, 60a)[9] Even if

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on the attorneys' fee issue, which wrongly assumes that subjective bad faith is a prerequisite to an award of attorneys' fees under Title VII. As with his questions on the retaliation issue, this question is not properly before the Court. In any event, the petition offers no authority for the proposition that §706(k) of Title VII somehow prohibits a court from imposing fees and/or sanctions in a Title VII case on other grounds. *Cf. Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 419 and n.13.

[9] Moreover, the record supports the District Court's findings on this issue. At trial, Quiroga testified at length to the events preceding his attorney's letter. He first mentioned the word "discrimination" when he testified that he told his superior in 1988 that he was "tired of the harassment and discrimination and unfair treatment they did to me last year." (Trial Transcript, February 27, 1990, p. 94) Quiroga later changed his testimony to state that he told his superior "that I would be seeking for an attorney if this continues and I will file charges of discrimination, or take it to wherever has to be taken." (*Id.* at 104) In neither instance did Quiroga specify the basis of the alleged discrimination. By contrast, two Hasbro officials testified that they were not informed, prior to the April 5 letter, that Quiroga had complained of unlawful discrimination. (*See id.* at 28, 47, 60) Given the contradictions between Hasbro's testimony and Quiroga's testimony, and the contradictions within

Quiroga had testified to this effect, the District Court was not *required* to believe him. *See* Wright & Miller, 9 *Federal Practice and Procedure*, §2586 at 736 (1971), *citing Guzman* v. *Rurz Pichirilo*, 369 U.S. 698, 702 (1962).

Quiroga further cites to a handful of cases in which attorneys' fees have been awarded, and implies that because these cases differ from the present action, a fee award is inappropriate. (*See* Petition, pp. 37-38) Citing to a handful of attorneys' fees cases establishes nothing, given the fact specific inquiry required. In any event, other courts have awarded attorneys' fees to employers when the causation element of a retaliation claim was not proven. *See Swint* v. *Volusia County - Department of Public Works*, 36 Fair Empl.Prac. Cas. (BNA) 1412, 1415-1416 (M.D.Fla. 1984); *Hunter* v. *Effingham County Board of Education*, 33 Fair Empl. Prac. Cas. (BNA) 67, 72-73 (S.D.Ga. 1983); *Davidson* v. *Allis Chalmers Corp.*, 567 F.Supp. 1532, 1539-1540 (W.D.Mo. 1983).

Finally, Quiroga seems to argue (*see* Petition, pp. 40-42) that because nothing in this case resembles the misconduct found worthy of sanctions in *Chambers* v. *NASCO, Inc.*, ____ U.S. ____, 111 S.Ct. 2123 (1991), then sanctions are inappropriate in this action. This argument ignores the fact that sanctions are imposed on a case by case basis. In any event, the District Court did not impose attorneys' fees under its inherent powers; the Third Circuit only remanded the case to the District Court to consider this issue, among others, given the frivolousness of the suit, and the apparent responsibility of Attorney Mills for what transpired. (*See* App. 13a-15a) Any arguments on this score are appropriately directed to the District Court.

"The one common strand running through [cases involving awards of attorneys' fees to employers] is that assessment of frivolousness and attorneys' fees are best left to the sound dis-

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Quiroga's own testimony, the District Court did not clearly err in finding that the complaints of national origin discrimination were an apparent "attorney construct." (*See* App. 60a)

cretion of the trial court after a thorough evaluation of the record and appropriate fact-finding." *Arnold* v. *Burger King Corp.*, 719 F.2d 63, 66 (4th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). Here, the District Court was in the best position to judge the merits of Quiroga's case. Quiroga has offered nothing but unsupported and unsound assertions to support his claims of error. A writ of certiorari should not issue.

CONCLUSION

For all the above reasons, Quiroga's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — Opinion of the United States Court of Appeals for the Third Circuit Filed September 6, 1991

FILED SEPTEMBER 6, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 AND 90-5748

ALVARO QUIROGA,

APPELLANT,

v.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON MOTION BY APPELLEES HASBRO, INC. and PLAYSKOOL BABY, INC. FOR DOUBLE COSTS AND ATTORNEYS' FEES
(D.C. Civil Action No. 89-01187)

Appeal Submitted Pursuant to Third Circuit Rule 12(6) On May 31, 1991

Motion Submitted Pursuant to Third Circuit Rule 11.1.

Before: HUTCHINSON, NYGAARD and ROSENN,
Circuit Judges

(Opinion Filed September 6, 1991)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

On June 11, 1991 we issued our opinion affirming the district court's judgment in Appeal No. 90-5284 rejecting Quiroga's claim that the Hasbro defendants unlawfully retaliated against him for asserting rights under Title VII, 42 U.S.C.§§2000e-2000e-17, by discharging him. In Appeal No. 90-5284 we affirmed the district court's order awarding $10,000 in attorneys' fees to the Hasbro defendants, but remanded to the district court for it to consider whether the fee should be levied against Quiroga, his counsel, Stephen R. Mills, or both. *Quiroga* v. *Hasbro, Inc. and Playskool Baby, Inc.*, 934 F.2d 497 (3d Cir. 1991). On July 5, 1991 we denied Quiroga's Petition for In Banc Rehearing.

We are now asked by the Hasbro appellees, under Fed. R. App. P. 38, and Rule 27 of this court to award them attorney's fees and double costs to be paid by Attorney Stephen R. Mills. We will award attorney's fees in Appeal No. 90-5284 only, plus costs.

I.

Federal Rule of Appellate Procedure 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

We apply an objective standard to determine whether an appeal is frivolous. *Hilmon Co.* v. *Hyatt International*, 899 F.2d 250, 253 (3d Cir. 1990). An appeal is frivolous if it is wholly without merit. *Sauers* v. *Commissioner of Internal Revenue*, 771 F.2d 64, 70 n. 9 (3d Cir. 1985), *cert. denied* 476 U.S. 1162 (1986). A Rule 38 damage award may be assessed against an appellant's attorney. "The test is whether, following a thorough analysis of the record and careful research of the

law, a reasonable attorney would conclude that the appeal is frivolous." *Hilmon*, 899 F.2d at 254.

When the district court rejected all of Quiroga's claims, it found them to be utterly without basis in law or in fact and entered judgment for Hasbro. When we affirmed the order we described Quiroga's suit as "obviously frivolous," and concluded that the parties and the court were subjected to unnecessary expense and inconvenience. *Quiroga*, 934 F.2d at 504.

We described Quiroga's contentions in appeal No. 90-5284 as without support in the record. *Quiroga*, 934 F.2d at 500. "Quiroga presented only his subjective belief, but absolutely no supporting evidence that Hasbro's motives [in discharging Quiroga] were improper." *Quiroga*, 934 F.2d at 502. This was known to Quiroga's attorney before he filed the appeal. Careful analysis of the record and research of the law should have led him, as it would any reasonable attorney, to conclude that he simply had no legal and factual basis for the lawsuit. A reasonable attorney would have concluded that Appeal No. 90-5248 was wholly devoid of merit.

Upon that conclusion our inquiry ends and Rule 38 Sanctions become appropriate. It would be fundamentally unfair to Hasbro if we permit Quiroga to compel Hasbro to court to defend an appeal that is wholly devoid of merit, without facing sanctions for doing so. It is a hollow victory indeed for an appellee who successfully defends a frivolous appeal, if it is then further penalized by fee payments to its own attorney. Accordingly, we will award attorney's fees in Appeal No. 90-5284 only, plus costs, as a sanction for pursuing a frivolous appeal.[1]

Finally, Hasbro submits that Quiroga's counsel, Stephen R. Mills, should be required to pay the award of fees and costs.

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[1] We will not impose sanctions in appeal No. 90-5748. Quiroga presented a marginal argument which, albeit poorly articulated, raised a "colorable argument." See *In Re Halls' Motor Transit Co.*, 889 F.2nd 520, 523 (3rd Cir. 1989).

We agree. We have already concluded that Rule 38 awards can be assessed against counsel. *Hilmon*, 899 F.2d at 253-254. Such an assessment is especially appropriate here, for we have already found that filing the action

> without any foundation in law or fact was as much Attorney Mills' fault as it was Quiroga's. Mills, as a trained lawyer, should have known better. He proceeded with an obviously frivolous lawsuit, after putting his client's job and future at great risk, and also subjected the parties and the court to unnecessary expense and inconvenience.

Quiroga, 934 F.2d at 504.

We concluded in *Hilmon* that

> attorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous. We conclude that if counsel ignore or fail in this obligation to their client, they do so at their peril and may become personally liable to satisfy a Rule 38 award.

Hilmon, 899 at 254.

As the Court of Appeals for the Seventh Circuit recently observed:

> the frequency with which federal judges are imposing sanctions for abuse of federal court process has increased markedly in recent years. The reasons are systemic. As the federal courts become more and more overloaded, the costs imposed on ethical and responsible litigants when judicial resources are diverted to the processing of frivolous claims and defenses mount higher and higher. Moreover, as the bar and the judiciary both expand, the incentive for self-regulation by lawyers that comes from appearing regularly before the same judges diminishes,

> making judicial regulation by sanctions increasingly necessary. We are in a transitional period, and some members of the bar still do not realize that the judicial attitude toward attorney misconduct has stiffened. They had better realize it.

Hill v. *Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1203 (7th Cir. 1985).

Accordingly, a judgment will be entered in favor of Hasbro, Inc. and Playskool Baby, Inc., for attorney's fees in the amount of $11,796.00 and costs in the amount of $394.08 against Stephen R. Mills, attorney for appellant.[2]

A True Copy
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[2] Attorney Mills does not challenge the amount of damages requested by Hasbro, only the propriety of the sanction.

APPENDIX B — Order of the United States Court of Appeals for the Third Circuit Entered July 5, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5284 AND 90-5748

ALVARO QUIROGA,

APPELLANT,

v.

HASBRO, INC. and PLAYSKOOL BABY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Action No. 89-01187)

Submitted Under Third Circuit Rule 12(6) On August 31, 1990

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROSENN, *Circuit Judges.*[*]

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the

[*] Judge Rosenn voted only on panel rehearing.

court in banc, the petition for rehearing is denied.

By the Court,

s/
Circuit Judge

Dated: JUL 5 - 1991